UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS et al :

Plaintiffs, : Case No. 1:11-cv-5632-DLI-RLM

: Date of Service: December 29, 2011

ANDREW M. CUOMO et al :

Defendants. :

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MEMORANDUM OF LAW BY DEFENDANTS JOHN L. SAMPSON AND MARTIN MALAVE DILAN IN OPPOSITION TO THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY THIS CASE, BY DEFENDANTS DEAN G. SKELOS, SHELDON SILVER, JOHN J. MCENENY, ROMAN HEDGES, MICHAEL F. NOZZOLIO AND WELQUIS R. LOPEZ

Preliminary Statement

Defendants,[1] Senators John L. Sampson and Martin M. Dilan (hereinafter "Sampson and Dilan"), respectfully submit this memorandum in opposition to the motion to dismiss, or in the alternative, to stay this "impasse" action, by their Co-Defendants, Dean G. Skelos, Sheldon Silver, John J. McEneny, Roman Hedges, Michael F. Nozzolio and Welquis R. Lopez ("Movants"). This Court should allow this action this action to proceed. An impasse in the redistricting process has arisen, and the time is ripe for prompt Court intervention or stay in the alternative.

Background

Six plaintiffs commenced this action against various New York State officials and government entities that play a role in New York State's redistricting process every ten years. The Plaintiffs allege that, as a result of an impasse in the New York State Legislature, this Court should appoint a special master to supervise the redistricting process. Complaint, ¶¶ 4-5.

Plaintiffs cite, *inter alia*, the shortage of time and the need for a prompt resolution of the redistricting plan as reasons that Court intervention is necessary. *See, e.g., id.* at ¶¶5, 9, 11 and 77-84.

Senators Sampson and Dilan oppose the Movants' motion to dismiss and agree with the Plaintiffs that an impasse in the redistricting process has arisen, and that, given the shortage of time prior to 2012 election season, the time is ripe for prompt Court intervention. As this memorandum further details, several factors are present in this redistricting cycle that were not

[1] Senators Sampson and Dilan have appeared in this action by Notice of Appearance entered by their attorney on December 8, 2011. This Court also granted *pro hac vice* admission to additional counsel representing the same defendants. Senators Sampson and Dilan have not yet interposed an Answer (time to answer has been extended).

present in ones of the past: A primary that will be rescheduled to an earlier unknown date, the new prisoner reallocation law, and the state legislator pledges supporting independent redistricting. Senator Dilan's affidavit that accompanies this memorandum describes a culture of divisiveness, an inability to agree, and partisanship among the members of the Legislative Advisory Task Force on Demographic Research and Reapportionment (LATFOR). As further detailed in the affidavit, this has led directly to LATFOR's failure, to date, to implement technical aspects of the new prisoner reallocation law discussed further below. This deliberate inaction highlights the need for Court scrutiny and supervision of the redistricting process.

A. Numerous Factors Unique to 2012 Necessitate Prompt Action

As the Plaintiffs set forth in the complaint, there are numerous factors absent from prior redistricting cycles that necessitate prompt intervention:

-- Starting this year, the State's federal primary elections will no longer be held in September, as was the case for the past three redistricting cycles, but instead, as described *infra*, will likely be sometime between late June and mid-August, subject to a federal judge's determination in early January;

-- Governor Cuomo has repeatedly warned that he will not sign into law lines that are drawn by LATFOR and has called for the establishment of an independent nonpartisan commission to conduct redistricting based on a number of criteria;

-- Despite reports of a so-called "agreement in principle" by the legislative leaders to implement the prisoner reallocation law, as of the date of this brief no details have been made public and LATFOR's year-long delay in implementation of the law does not bode well for swift implementation;

-- Local governments are also waiting to conduct redistrictings, or will need to redo them, when they finally get census data required under the prisoner reallocation law.

-- Finally, although not unique to 2012, the Voting Rights Act requires that the U.S Department of Justice grant "pre-clearance" to the New York redistricting plan because the counties of New York, Kings and the Bronx are "covered jurisdictions" under the Act. This pre-clearance process involves a 60-day review period, and involves additional time if the DOJ rejects a submitted plan.

These factors support the Plaintiffs' request for immediate relief and denial of the motion to dismiss. The Movants' argument that the Court should wait until five months before the primary date to act misses the point that 2012 will be a unique election cycle and one that will start earlier than it has in the past three decades. Moreover, as described below, in each of the past three redistricting cycles in New York, there have been disruptions to the political calendar, indicating that earlier intervention may have been beneficial. The higher degree of uncertainty that exists now makes the swift action by the Legislature and agreement by the Governor unlikely. Sampson and Dilan therefore conclude that the Court should deny the motion to dismiss and retain jurisdiction.

B. The Past Three Redistricting Cycles Were Plagued by Delays

The Movants insist that the benchmark of five months of lead time that courts have followed in previous redistricting cycles in New York must be the unwavering measure in this present redistricting cycle, but their claims that the Legislature was successful in avoiding election calendar disruptions inthose cycles, for instance, in 1992 and 2002, are belied by the facts. In each of the last three decades, New York repeatedly failed to complete the redistricting

process without delays that resulted in the disruption of the election calendar, and in each case, actual or threatened court intervention was necessary to finally implement approved redistricting plans.

1972

1972 was the last redistricting year in which the primary election was scheduled earlier than September (June 20, 1972). It was also the last time that decennial redistricting was accomplished without judicial supervision and without disruption of the normal schedule for circulating petitions to designate candidates for the primary ballot. The 1972 redistricting bills were introduced in both houses of the Legislature on December 15, 1971, on the recommendation of the Joint Legislative Committee on Reapportionment (LATFOR's predecessor), and the plan for Assembly and Senate districts was signed into law on January 14, 1972 as Chapter 11 of the Laws of 1972. *See Matter of Schneider v. Rockefeller*, 38 A.D.2d 495, 497 (1972).

1982

In 1982, a group of concerned citizens filed *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982) on February 10, 1982, challenging the constitutionality of existing state and congressional districts. On April 2, 1982, after oral argument, the court ordered that Assembly, Senate, and congressional districts to be redrawn by April 16, 1982 on the basis of the 1980 census data. The Court appointed a special master, ordering him on April 23 to develop plans for Assembly, Senate, and congressional districts. *See* Report of the Special Master, *Flateau v. Anderson*, 82 Civ. 0876, at 1.

On May 10, 1982, plans for state and congressional districts passed both houses of the Legislature, and these bills, with further chapter amendments, were signed into law on May 19. Report of the Special Master at 4.

The delay until May, which might have been avoided with earlier court intervention, caused significant disruption of the political calendar. Indeed, the Legislature was forced to twice revise the political calendar during this period. First, Chap. 371 of the Laws of 1982 postponed the first date for circulating petitions to designate candidates for the primary ballot to July 6 Then, Chap. 449 of the Laws of 1982 further postponed that date to July 20. The petition period was shortened, and the number of required signatures was halved. The disruption also led to the postponement of the primary election date from September 14 to September 23, an option that is most definitely not available in 2012.

1992

In 1992, after failing to agree on a congressional redistricting plan, LATFOR made no proposals to the Legislature, and litigation ensued. One proposed plan by a federal court-appointed special master was submitted on May 26, 1992. *Puerto Rican Legal Defense and Education Fund v. Gantt (PRLDEF)*, 796 F.Supp. 681, 684-85 (E.D.N.Y. 1992) (consolidating *Waring v. Gantt*, W.D.N.Y. CV-92-1776). In the meantime, in a parallel action, *Reid v. Marino*, -- Misc. 2d --, N.Y.Sup.Ct.No. 9567/92, (Kings County 1992), the court appointed a team of three referees, who produced a congressional redistricting plan on June 4, 1992. Facing the threat that the federal court would impose the special master's plan, the Legislature then enacted the state court referees' plan in votes held on June 8, 9, and 10. The redistricting bills were signed into law on June 11. See *PRLDEF*, 796 F.Supp. 681, 685. The district court ordered that the plan by its appointed special master would go into effect if the Justice Department did not "pre-clear" the

enacted plan by July 8, one day prior to the newly enacted date for the start of the petition period. *Id.* at 686. The enacted plan did receive preclearance, and was used in the 1992 elections.

The delayed redistricting required the postponement of the beginning of the petition period by a full month, from June 9 to July 9, accomplished by the enactment of Chap. 135 of the Laws of 1992.

2002

In 2002, LATFOR again failed to recommend congressional districts to the Legislature, and the legislative leaders did not agree on a plan until a federal court-appointed special master and state court referee had again proposed congressional plans. The Legislature once again failed to complete congressional redistricting until faced with the threat of a special master's plan, and the political calendar was again disrupted by the delayed completion of redistricting. *See Rodriguez v. Pataki*, 308 F.Supp.2d 346, 356-358 (S.D.N.Y. 2004), (citing chronology).

On April 26, the federal district court appointed a special master to draft a congressional plan; and on April 30, in the parallel case of *Allen v. Pataki*, -- Misc. 2d -- (N.Y. Cty.,2002) N.Y. Sup.Ct., No. 101712/02, a referee to perform the same function. Each filed their respective reports on May 13 (special master) and on May 20 (referee). On May 24, the federal court ordered the special master plan into effect, but indicated its willingness to withdraw its order if the Legislature enacted a suitable plan. On June 5 both houses approved a modified congressional plan based on the federal special master, and it was signed into law on the same day. The Justice Department pre-cleared the state legislative redistricting plans on June 17 and the congressional plan on June 25, and on that day the federal district court withdrew its order imposing the special master's congressional plan.

The delay in the completion of congressional redistricting again required revision of the political calendar. Chapter 56 of the Laws of 2002, enacted on June 3, postponed the first day for circulating designating petitions to June 18, and the last day for filing petitions to July 25. The Memorandum in Support of the Assembly version of the bill (A11549) states that the "bill adjusts the political calendar by pushing back the petitioning process two weeks," and that "[b]ecause of delays with Congressional redistricting, delaying the start of petitioning will help facilitate an effective petitioning process."

This history seriously undermines the Movants' argument that the Court should adhere to the historical practice of waiting until closer to the primary election date to intervene. In each of the past three redistricting cycles, court intervention was necessary to spur legislative action, but because that intervention did not happen until closer to the start of the election calendar, the delays still led to disruption and necessitated changes to the political calendar. This action is ripe and the Court should proceed to appoint a special master.

Argument

A. GIVEN THE HISTORY, A "FIVE MONTH LEAD TIME" IS TOO SHORT TO ENSURE ORDERLY ELECTIONS IN 2012

As set forth at length above, in each of the last three redistricting cycles, New York State has repeatedly failed to complete the redistricting process without delays that resulted in the disruption of the election calendar, as detailed below. This seriously undermines the Movants' argument that this case is not yet ripe.

The Movants' assertions that the Legislature "still has months" to act (*id.* at 1), that there is "more than enough time" (*id.* at 7), that "the Legislature will enact a redistricting plan well in advance of the primary elections" (*id.* at 8), or that is has "more than ample time to perform…"

(*id.* at 11) ring hollow in light of the state's history of delay when it comes to redistricting. As discussed above, in each of the past three redistricting years, court intervention came too late to ensure that redistricting would be done without disrupting that year's political calendar.

B. SEVERAL FACTORS UNIQUE TO 2012 NECESSITATE PROMPT COURT ACTION

Moreover, the factors cited above strongly favor prompt intervention by the Court to ensure that redistricting occurs in a timely fashion.

First, the federal primary elections, historically the second Tuesday in September, will now be held on a date to be determined between June and mid-August 2012, which will move up the entire political calendar by one to three months. Second, LATFOR as yet has failed to implement the prisoner reallocation. Third, the Governor has called for an independent commission to draw state and federal legislative lines, and has promised to veto any reapportionment bill containing LATFOR's recommendations.

1. Earlier Primaries

A federal district court judge is expected by early January to set New York's new federal primary election date for 2012 and beyond. In pending litigation, the U.S. Department of Justice sued New York State and the State Board of Elections alleging that the State's federal primary election date, which is the second Tuesday in September, does not comply with the federal Military Overseas Voter Empowerment ("MOVE") Act. *United States of America v. State of New York, et al.*, Case no 1:10-CV-1214 (GLS)(NDNY, Sharpe, J.). All parties agree that the federal primary date must be changed in order to comply with MOVE Act requirements regarding shipment of military and overseas absentee ballots.

The Movants barely acknowledge this important factor, which necessitates swifter-than-usual implementation of a redistricting plan. *See* Movants' Law Mem at 10 ("Plaintiffs, of

course, acknowledge that no such action has yet been taken"). They acknowledge only the "possibility" of a new primary date, but make the unsupported claim that this action still would not be ripe for at least another few months. *See id.* However, contrary to the Movants' assertions, there is no legally-mandated date by which court intervention becomes permissible.

2. Lack of Implementation of Prisoner Reallocation Law

An additional ingredient that is present in the current districting cycle that previously never existed is the prisoner reallocation law, enacted in August 2010, but which has yet to be implemented. As Senator Dilan describes in his accompanying affidavit, disagreement and partisanship among LATFOR members has led to stalemate. See, e.g., Dilan Aff, ¶¶14-20. Movants do not deny that LATFOR members evaded their obligation to implement the prisoner reallocation law, stating only: "A redistricting plan can be drawn just as quickly with prisoner reallocation as one without such reallocation. Plaintiffs simply offer no explanation as why this Court should assume the sovereign function of the Legislature at this early juncture." Movants' Mem. Law at 9. Despite Movants' assertions, LATFOR has delayed implementation of this law for a year, and the Court should not permit any further delay.

3. Governor's Promise to Veto LATFOR Redistricting Plan

During campaign season for state legislative races in 2010, some 138 current legislators signed a pledge of support for independent redistricting, and as the plaintiffs describe in the complaint, the vast support for the pledge by candidates for office who are now legislators demonstrated significant political support for independent redistricting. See Complaint ¶¶56-57. Despite this, the commitments to back legislation to create a new body in government to institute independent redistricting failed to materialize, and no independent redistricting process has been established. With LATFOR remaining in command of the process, Governor Andrew Cuomo

has publicly denounced any redistricting process or plan that might result from LATFOR due to its partisanship, and he has repeated a public promise to veto any redistricting bill that are the product of the existing process. See, e.g., Complaint ¶¶71 (quoting his announcement introducing bill for permanent reform of redistricting process). Since any redistricting in New York that originates in the Legislature will be the product of LATFOR, a veto by Governor Cuomo makes court intervention not a question of if but when. Though the process has not advanced far enough for legislation to pass even the Legislature, the public pronouncements of a veto is still one additional factor supporting the need for this action to proceed and for this Court to retain jurisdiction. It should be noted that, in the recent history of involvement of special masters in New York's redistricting process, as discussed *supra*, court intervention began too close to the election calendar and in each instance did not succeed in avoiding disruptions to the election calendar.

Conclusion

For the foregoing reasons the motion to dismiss must be denied and this action should be allowed to proceed.

Dated: December 29, 2011

Respectfully submitted,

/s/Leonard M. Kohen
Leonard M. Kohen(LK3000)
67 e. 11th Street, #703
New York, NY 10003
Tel: (212) 254-8371
leonard.kohen@gmail.com

Jeffrey M. Wice
P.O. Box 42442
Tel (202)494-7991
wicenysenate@gmail.com

Attorneys for Defendants,
John L. Sampson and Martin Malavé Dilan

CERTIFICATE OF SERVICE

I hereby certify that, on December 29, 2011, a true and correct copy of the foregoing and, a true and correct copy of the Affidavit of Senator Martin Malave Dilan in Opposition to Motion to Dismiss, were served on each of the following attorneys of record through the Court's CM/ECF system:

WILLKIE FARR & GALLAGHER LLP
Attorneys for Plaintiffs

Richard Mancino
Daniel M. Burstein
Jeffrey A. Williams
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
rmancino@willkie.com
dburstein@willkie.com
jwilliams@willkie.com

OFFICE OF THE ATTORNEY GENERAL
OF NEW YORK STATE
Attorney for Defendant Andrew M. Cuomo, Robert J. Duffy and Eric T. Schneiderman

Joshua Benjamin Pepper
120 Broadway, 24th Floor
New York, NY 10271
212-416-8567
212-416-6075 (fax)
joshua.pepper@oag.state.ny.us

JONES DAY,
LEWIS & FIORE
Attorneys for Defendants Dean G. Skelos, Michael F. Nozzolio, Welquis R. Lopez

Michael A. Carvin
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
(202) 626-1700 (fax)
macarvin@jonesday.com

Todd R. Geremia
Jones Day
222 East 41st Street
New York, NY 10017
212-326-3429
212-755-7306 (fax)
trgeremia@jonesday.com

David L. Lewis
Lewis & Fiore
225 Broadway
Suite 3300
New York, NY 10007
(212)285-2290
(212) 964-4506 (fax)
dlewis@lewisandfiore.com

GRAUBARD MILLER
Attorneys for Defendants Sheldon Silver, John J. McEneny and Roman Hedges

C. Daniel Chill
405 Lexington Avenue
New York, NY 10174
(212) 818-8800
(212) 818-8881 (fax)
dchill@graubard.com

COUCH WHITE, LLP
Attorneys for Defendant Brian M. Kolb

Harold D. Gordon
540 Broadway
P.O. Box 22222
Albany, NY 12201
(518) 426-4600
(518) 320-3496 (fax)
hgordon@couchwhite.com

SINNREICH & KOSAKOFF LLP
Attorneys for Defendant Robert Oaks

Timothy F. Hill
267 Carleton Avenue
Central Islip, NY 11722
(631) 650-1200
(631) 650-1207 (fax)
thill@skmlaw.net

/s/Leonard M. Kohen
Leonard M. Kohen